IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 582 of 2002

For Approval and Signature:

HON'BLE MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

K.T.SHAH

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 582 of 2002

MR IS SUPEHIA for Petitioner No. 1

MR PD BHATE, AGP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 13/04/2004

ORAL JUDGEMENT

1. In this petition the grievance of the petitioner is that he has not been given the higher

pay-scale to which he is entitled in view of the provisions of the resolution issued by the Government dated 16th August, 1994. It is the say of the petitioner that at the relevant time i.e. in the month of June 1987 he was entitled to have upgraded pay-scale i.e. in the higher grade scale of Rs.2500-4200, but he was granted the scale of Rs.2000-3500 with effect from 1st June, 1987. It is his say that on that day he had completed 18 years of service and as Senior Auditor in Class-III, he was entitled to have the benefit of the provision of clause 3 (3) of the Government Resolution dated 16th August, 1994 issued by the Finance Department of the State of Gujarat. It appears from the record of this petition that on 1st June, 1987 the petitioner was working as Senior Auditor in Class-III in the Energy and Petrochemicals Department of the State Government. With the introduction of the scheme to grant revised and higher scale to the officers who got stagnated on account of there being no promotional posts available, the provision was made to grant them higher grade of pay-scale. Sub-clause (3) of Clause 3 provides that while deciding the higher grade of pay-scale lowest scale of the promotional post be granted to the concerned employee, if he was not covered under the proviso to the said clause. According to the petitioner, his next promotional post would be that of the Chief Auditor, Class-I and the pay-scale of the said post is Rs.3000-4500. However, he has claimed the scale of Rs.2500-4200 because of the ceiling limit imposed under the said circular.

1.1. It appears that the petitioner had joined the Department initially as Junior Auditor with effect from 1st November, 1963. He was thereafter directly appointed as Senior Auditor with effect from 23rd April, 1965. In the month of July 1991 the State Government introduced a scheme to remove the stagnation and provide that the employees who did not earn the promotion but at the same time who had rendered 9 - 18 - 27 years' service should be granted the benefit of higher grade scale. The grant of higher pay-scale was to be at different stages, namely after completion of 9 years, 18 years and 27 years of service. According to the petitioner, he had already completed 18 years of service on 1st June, 1987 and he did not get any promotion. Therefore, he was entitled to have benefit of the said scheme and he should have been granted the scale of Rs.2500-4200. It appears that he had taken up this issue with the Government by making representations, etc. It also appears from the record of this petition that his superiors had also recommended the higher grade of pay-scale as requested by the petitioner.

In other words, it was recommended by the superior officers of the petitioner to place him in the scale of Rs.2500-4200, that being the scale of the promotional post of Chief Auditor.

1.2. As against that, the stand of the Government is that at the time when the scheme was introduced i.e. in the month of June 1987 the petitioner was working as Senior Auditor in Class-III. So far the Class-II post was concerned, according to the respondents, the same was upgraded to Class-I. Therefore, so far as the petitioner is concerned, no post for promotion was available to the petitioner as on 1st June, 1987. It is the say of the respondents that the petitioner was covered under the proviso to clause 3 sub-clause (3) of 1994 resolution which prescribes that if there is no higher grade scale of the promotional post, the scale in accordance with the schedule be granted to such officer. At this juncture, it may be necessary to state what is contained in clause 3 (3) of the 1994 resolution. It states that higher pay-scale would mean the scale of the promotional post. The proviso prescribes that if there is no scale of promotional post, in that event to grant benefit in accordance with the provisions of the scheme.

1.3. There is no dispute that the post of Chief Auditor Class-I would be filled up in two ways, namely by promotion and secondly by direct recruitment through G.P.S.C. The services of the Chief Auditor and Senior Auditors are being governed by the Government Resolution issued by the Public Works Department dated 30th July, 1959 of the then State of Bombay. The said recruitment rules prescribe that the appointment to the post of Chief Auditor could be made either by promotion from amongst Senior Auditors of proved merits and efficiency from the Electrical Circle of Public Works Department or by nomination. So far the promotion to the post of Senior Auditor is concerned, these rules prescribe that it should be made either by promotion from amongst Junior Auditors of proved merits and efficiency or by nomination in the ratio of 50 : 50. It also appears that originally the post of Chief Auditor belonged to Class-II, but the same was upgraded with effect from 24th April, 1970. Thus, so far the post of Senior Auditor Class-II is concerned, it has ceased to exist on account of upgrading of the said post to Class-I. Basing his claim on this position the petitioner has demanded the aforesaid scale on the ground that he being Senior Auditor in Class-III, the next promotional post for him would be that of Chief Auditor,

Class-I. Ofcourse, the respondent has denied the said claim. As stated above, according to the Government, the petitioner could at best be entitled to receive higher pay-scale which would be available to him on his rendering service for 9 years. So far the benefit of second stage i.e. 18 years would be available to him only in the year 2005 It may be noted here that the petitioner having reached the age of superannuation, has retired from the service on 30th August, 2000.

2. Mr. I.S. Supehia, learned advocate appearing for the petitioner has heavily relied on the first part of Clause 3 (3) of the 1994 resolution. According to him, since the petitioner was Senior Auditor, Class-III, next promotional post was that of the Chief Auditor Class-I. He has, therefore, submitted that the petitioner should be given the higher pay-scale in accordance with the main provision of Clause 3(3) and the same has wrongly be denied. He has further submitted that in the year 1989 his post was upgraded by the respondent and it was made Class-II.

2.1. As against that, Mr. P.D. Bhate, Ld. AGP has submitted that the petitioner was not falling in the category prescribed in the main part of Clause 3(3), but he was covered under the proviso to said clause, which states that when there was no grade of promotional post available, he should be given the scale in accordance with the schedule annexed to the resolution. According to Mr. Bhate, the petitioner since had put in 9 years' service, was entitled to receive the scale of Rs.2000-3500. He has further submitted that the rules relied on by Mr. Supehia are no more in existence and they have been dispensed with since the year 1970 and, therefore, it cannot be said that the next promotional post for the petitioner was that of the Chief Auditor, Class-I.

3. Having carefully gone through the record of the petition and having considered the submissions of the learned advocates for the parties, it clearly appears that the petitioner was working as Senior Auditor in Class-III as on 1st June, 1987, though it is disputed by the respondent. It is also clear that by then the petitioner had already rendered service of more than 18 years and before he could reach the third stage i.e. 27 years, he retired in the year 2000. The question, therefore, is whether the petitioner would be entitled to have the grade of pay-scale meant for Chief Auditor, Class-I. As stated above, the Bombay rules clearly prescribe the promotion to be made to the post of Chief

Auditor and that was to be made from the post of Senior Auditor. The rules do not prescribe any class of service. It only stated that the Senior Auditor of proved merits and efficiency in the Electrical Circle of Public Works Department could be promoted to the post of Chief Auditor. In the instant case at the relevant time, the petitioner was holding the post of Senior Auditor. Though it has been described as Class-III post then, so far the Bombay rules are concerned, it did not prescribe any class, but only stated that the feeder cadre would be that of Senior Auditor. Since the aspect of next promotional post from the post of Senior Auditor Class-III was not clear from the record, the State Government was directed to file additional affidavit explaining this position. Pursuant to the said direction, the respondent has more or less repeated what has been stated in its earlier affidavit. In the said affidavit, it has been averred by the respondent that the post of Chief Auditor Class-I was upgraded in the year 1970. Thereafter, Class-II post did not exist. However, the say of the respondent is that Senior Auditor Class-III would not become entitled to the promotion on the post of Chief Auditor, Class-I. It is tried to be submitted that during all these years no appointment by way of promotion could be made and the post of the Chief Auditor could be filled up only by way of direct appointment through G.P.S.C. The respondent was specifically asked to clarify the position whether the petitioner, if at the relevant time i.e. in the month of June 1987 was required to be promoted, to which post he would have been promoted. However, that aspect has not been covered in the subsequent affidavit also though adequate chance was given to the respondent. It may also be noted here that the respondent has failed to place on record any documentary evidence to support its contention that the Bombay rules had ceased to exist long back and in the year 1987 the rules were not in existence. In view of such averments the respondent was also asked to place on record the provisions which according to it governed the recruitment of the Senior Auditor and the Chief Auditor. Respondent has, however, failed to point out any such provision which could support its say regarding replacement of the Bombay rules by appropriate provision in this behalf adopted by the State of Gujarat. In fact the say of the respondent is that since 1970 the matter regarding framing of such rules is under consideration of the State Government and at present no such provisions are in existence. Thus, the position is that even after lapse of 34 years the respondent has not framed any rules governing the service of the Senior Auditor and Chief Auditor in the matter of their

appointment and/or recruitment. As stated above, nothing has been placed on record to substantiate the say of the respondent that the Bombay rules have been replaced, though more than sufficient opportunities were given to the respondent to do so. In fact vide communication addressed to the Under Secretary, Energy & Petrochemicals Department, Sachivalaya, Gandhinagar dated 27th January, 1993 the case of the petitioner was recommended by the Collector of Electricity Duty, Ahmedabad for grant of pay-scale of Rs.2500-4200. In the said letter it has been stated that formerly the post of Chief Auditor belonged to Class-II but later on in the year 1970 it was upgraded to Class-I. However, no change was brought about in the recruitment rules for the promotion to the post of Chief Auditor even after its upgradation to Class-I. Thus, the position has remained the same and the Bombay rules appear to be still holding the field. If that be so, then naturally the petitioner being Senior Auditor, Class-III at the relevant time i.e. 1st June, 1987, his promotional post would be that of the Chief Auditor. A faint attempt has been made by the respondent to show that the petitioner could not have been promoted to the post of Chief Auditor because he was not found fit for the same. However, the question to be decided is not why the petitioner was not promoted to the said post. The question is with regard to what higher pay-scale that could have been granted to the petitioner in accordance with 1994 resolution. It may be stated here that the petitioner's post was upgraded vide resolution dated 14th August, 1989 from Class-III to Class-II and ultimately he retired as Class-II officer. It also appears from the record that so far the G.P.S.C. is concerned, he was found fit for being appointed to the post of Chief Auditor and he was placed at serial no. 3 in the select list for the said post. Thus, even on account of fitness he could have been promoted to the post of Chief Auditor. If the respondent has not been able to substantiate its say to the effect that there was no promotional post available in the year 1987, it has failed to substantiate that say with appropriate evidence. It is hardly believable that no rules or regulations would be there to govern important positions like that of the Senior Auditor and Chief Auditor. I have, therefore, no other option but to accept the say of the petitioner that the Bombay rules still existed and governed the services of the Auditors in the respondent's Department. If that be so, then according to rule 1 of Bombay rules the promotional post of the petitioner was that of the Chief Auditor. Merely because the said post has been upgraded, in view of the Bombay rules, it cannot be said that it is not a promotional post to the post of Senior Auditor.

When this position is clear, naturally the case of the petitioner would stand covered under the main part of clause 3 sub-clause (3) of 1994 resolution, which prescribes grant of pay-scale of the promotional post. The scale of the promotional post is Rs.3000-4500. However, the 1994 resolution has prescribed a ceiling limit of Rs.3500. In view thereof, the petitioner has claimed that he is legitimately entitled to receive the benefit of Rs.2500-4200.

4. In view of the aforesaid discussion, it is crystal clear that the petitioner would be falling under the category contained in sub-clause (3) of Clause 3 of 1994 resolution. The petitioner, therefore, would be entitled to have the grade scale of Rs.2500-4200 instead of Rs.2000-3500 with effect from 1st June, 1987. The respondent is directed to grant the aforesaid higher pay-scale of Rs.2500-4200 to the petitioner and pay the arrears, if any, on or before 30th August, 2004. This petition is, therefore, allowed. Rule made absolute with no order as to costs.

[AKSHAY H. MEHTA, J.]

* Pansala.